

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

GREENE JOHNSON, et al., : Docket #24-cv-872
Plaintiffs, :
-against- :
UNITED STATES OF AMERICA, : New York, New York
June 24, 2024
Defendant.

PROCEEDINGS BEFORE
THE HONORABLE DALE E. HO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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THE DEPUTY CLERK: Good morning, everyone.
The judge has been brought into the conference, so
we can begin. The Honorable Dale E. Ho presiding in
the matter of Greene Johnson v. United States of
America, Docket Number 24-cv-872.

Counsel, can you please state your names
for the record, starting with the plaintiffs?

MS. FRANCOIS: Good morning, Your Honor.
Deborah Francois for the plaintiffs Muhammad Aziz
and Helen Greene Johnson. And I'm joined by my
colleagues, Tristan Ellis and Eleanor Davis.

MS. MARRYSHOW: This is Danielle Marryshow
for the United States. And I'm joined with my
colleagues, Jeff Oestericher and Ilan Stein.

THE DEPUTY CLERK: Counsel, this is a
reminder that this is a public proceeding. Members
of the public and press can access the proceeding
with a public dial-in number. Please be aware that,
just as if you were physically present in the
courtroom, you are prohibited from recording,
rebroadcasting, or disseminating any recording of
court proceedings, including this one.

Your Honor ...

THE COURT: Good morning. We're here on a

1 discovery dispute.

2 And Ms. Francois, why don't you just kick
3 us off for the plaintiffs.

4 MS. FRANCOIS: Thank you, Your Honor. So
5 the main remaining discovery dispute is Plaintiffs'
6 request that the Government simply begin the process
7 of obtaining security clearances. As you noted,
8 there is the other dispute about the potential
9 deposition of former FBI Director William Webster,
10 but we believe that that position could be -- that
11 issue can be tabled for the time being.

12 With respect to the issue of the security
13 clearances, Plaintiffs' request is a limited one and
14 one that we, in our view, see it as beneficial for
15 both the parties, as well as the Court. Our
16 position is one of trying to being practical,
17 expeditious, and contrary to the Government's claim.
18 Otherwise, our request is far from being premature.

19 All that we're asking the Government to do
20 is begin the process of obtaining security
21 clearances for the attorneys working on this case,
22 which is a process that we all know can take many
23 months to complete. We're not requesting that the
24 Government grant us clearance at this point. And
25 we're not asking the Government, as the Government

1 has suggested, that they conduct wholesale searches
2 for documents, review all the documents for
3 responsiveness, and then determine whether they're
4 properly classified.

5 And as we noted in our joint status report,
6 the Government doesn't have to do any of that
7 because there's already a set of documents that
8 concern the Malcolm X case that we know are
9 relevant, that we know were assembled by the FBI
10 itself, and that we know contain classified
11 redactions. And by that, I'm referring to the
12 Malcolm X related files published on the FBI's FOIA
13 library, the Vault.

14 So as you noted in the letter, we scanned
15 these files to see whether any of the redactions or
16 withholdings were under FOIA Exemption (b)(1) for
17 classified information and national security, and we
18 didn't need to go far in this review because we saw
19 early on -- we stopped counting at about 100 -- that
20 there were many redactions on this basis. And, in
21 fact, there was, in some cases, entire pages were
22 withheld.

23 So just to point Your Honor to several of
24 these examples, on one of the documents, it's a
25 document dated February 23, 1965. This is just two

1 days after the murder of Malcolm X. This report
2 discusses the shooting and, among the redacted
3 portions, is an entire paragraph following a
4 sentence that stated: "Standing men then ran to the
5 left aisle and was last seen turning into middle
6 exit." This appears to obviously be discussing the
7 perpetrators.

8 There was another report, dated February
9 24th, where, similarly, there is an entire paragraph
10 redacted following a sentence stating: "This man
11 then ran to the left aisle and was last seen turning
12 into the middle exit." So these are just several
13 examples of redactions that we saw in the Vault
14 materials that clearly contain relevant reformation,
15 that clearly provide -- that seems to be providing
16 descriptions of the perpetrators.

17 So one other point I'd like to note is
18 that --

19 THE COURT: Well, Ms. Francois, may I ask
20 you a question? As a -- as a practical matter, my
21 understanding -- and obviously, I'll ask -- I
22 believe it'll be Ms. Marryshow about the
23 Government's position.

24 But my understanding of the Government's
25 position is that they can't just sort of start the

1 security clearance process by itself. What they
2 need to do is have a document request in front of
3 them, determine whether or not there are responsive
4 documents, and then whether or not those documents
5 contain classified materials.

6 So are you asking to serve your document
7 requests now so that you can -- with an eye towards
8 security clearance process, or are you actually
9 asking me to order the Government to start the
10 security clearance process before there are any
11 document requests on the table?

12 MS. FRANCOIS: We're asking the latter,
13 Your Honor, because our understanding, as at least
14 the Government presented to us, is that we just need
15 to demonstrate a foreseeable need or a need for
16 access, and we believe that that's already been
17 demonstrated here, given the documents on the Vault.
18 You know, that's already one set of documents we
19 know are relevant to this case. That's already one
20 set of documents we know have redactions, based on
21 classified information.

22 In the joint letter, we propose that we
23 serve discovery requests on the Government, and they
24 respond with responses and objections, but we don't
25 think that's necessary. We gave that as a proposal,

1 if what the Government needs are concrete, formal
2 discovery requests that they can show to the FBI and
3 say, hey, this is what we're looking for. But we
4 don't think that that's necessary because we already
5 think we've met the threshold of demonstrating
6 foreseeable need, given that we know that there's at
7 least this one set of documents.

8 You know, we're trying to be reasonable
9 here, and we think that the materials on the Vault
10 could at least be a starting point and demonstrate
11 the need -- the threshold requirement that the
12 Government is indicating that we need to satisfy.

13 THE COURT: Okay. Thank you for that
14 clarification. I appreciate it. I believe I cut
15 you off before you're about to make a different
16 point.

17 MS. FRANCOIS: Actually, Your Honor, that
18 addresses the second point I was going to make,
19 which is that the Government's incorrect when it
20 claims that we haven't demonstrated foreseeable need
21 for access or need to know. These documents on the
22 Vault, they contain heavy redactions. So this isn't
23 hypothetical.

24 We noted that the Government's position has
25 evolved through these discussions. You know, from

1 the outset, we made it clear to the Government that
2 our baseline position isn't that the discovery
3 should be stayed during the pendency of the motion
4 to dismiss. We agreed, however, that we could have
5 these discussions and see if we could just engage in
6 limited discovery and take certain steps, one of
7 which was to start the process of obtaining security
8 clearances. When we noticed that, you know, earlier
9 on, the Government indicated that they weren't sure
10 if there are any -- will be any clearance issues.
11 So then -- given the age of the file or whatever
12 other reasons.

13 So we said okay. And so we looked at the
14 vault documents, and we pointed to them and we let
15 them know that there are, in fact, classified
16 materials. Once we said that, then the Government's
17 position evolved, and they said, okay, we would have
18 to try to see if any of these redactions are, in
19 fact, based on national security classified
20 information reasons. And we said, okay, those
21 materials are equally available to us. We'll
22 undertake that exercise. We did so, and we saw many
23 redactions with the notation specifically saying
24 (b)(1), which is the FOIA exemption for national
25 security classified information.

1 And then they said that, okay, we can't get
2 clearance ahead of time. So then we asked, all
3 right, what if we propose -- we defer any clearance
4 determination, but we just start this process? And
5 that was the last correspondence that we had before
6 filing the joint status letter when the Government
7 rejected the proposal and said that we would need to
8 demonstrate this threshold, foreseeable need.

9 You know, I think that the Government has
10 constantly pointed to the motion to dismiss, saying,
11 well, we have -- we don't know what claims will
12 survive. But our position is that we think it's
13 clear that the case will survive the motion to
14 dismiss. Your Honor has, you know, made it -- had
15 an opportunity already to read the Government's
16 opening brief in our opposition papers, and we think
17 it's clear that there will be at least some claims
18 that survives and the case will proceed.

19 But in any event, even if that's not the
20 case, at this point, all claims remain, and at this
21 point, discovery isn't yet stayed. So we think it's
22 good practical sense to begin the process of
23 obtaining security clearances, moving this case
24 forward and preventing what we know will be a
25 lengthy delay down the road.

1 THE COURT: Okay. Thank you for that, Ms.
2 Francois.

3 And for the Government, is it Ms.
4 Marryshow? And I'm sorry if I'm mispronouncing your
5 name.

6 MS. MARRYSHOW: No, Marryshow is correct.
7 Thank you, Your Honor.

8 THE COURT: Okay. Thank you. Please
9 proceed.

10 MS. MARRYSHOW: Of course.

11 So we appreciate the plaintiffs' desire to
12 expedite this case, due to Mr. Aziz's age. We've
13 tried to be accommodating in that regard. We've
14 consented to numerous depositions. We've looked
15 into whether -- make sure the documents are gathered
16 in a way such that document discovery can start as
17 soon as the motion to dismiss is adjudicated.

18 But the plaintiffs' proposal is just not
19 something that is possible under the governing
20 executive orders. We can't just start the process
21 of getting security clearances for plaintiffs'
22 counsel unless they establish this need to know the
23 relevant classified materials. And so relevance is
24 the wrong standard here.

25 I think the Government would concede that

1 there may be documents that are relevant or
2 responsive to the request, but the question then
3 becomes, A, whether any other privilege applies.
4 And if it does, then this whole classified issue is
5 obviated. And also, we need to understand what else
6 they know about the case. And it's not just in the
7 context of the FOIA materials. It's in the context
8 of whatever else we may produce down the line.

9 So the Government's fundamental position is
10 that no matter what, there's no quick way for us to
11 determine whether they need to know these classified
12 materials. And that would only really come at the
13 end of the process when we understand, what do we
14 produce that is non-privileged and non-classified?
15 The context of that are these classified materials
16 crucial to their action.

17 THE COURT: So if I'm understanding you
18 correctly -- and please tell me if I'm not -- Ms.
19 Marryshow, your position is there's really no way to
20 start this process until you've engaged in document
21 discovery. You've seen their requests. You've done
22 your internal privilege reviews and everything else,
23 and then get to a point where you have responsive
24 documents that you're otherwise able to produce, but
25 for the clearance issue, and then you would start

1 the clearance process; is that right?

2 MS. MARRYSHOW: That is correct, Your
3 Honor. And we appreciate that that may introduce
4 some delay in the case, but it -- it's just
5 unavoidable delay. We will be producing documents
6 if we get into discovery, assuming, you know, if the
7 motion to dismiss is denied in part or in its
8 entirety, and we get into discovery, we would be
9 producing other documents, other documents that are
10 not classified. So it's not as if the plaintiffs
11 would get no documents and would be -- you know,
12 we'd all have to sit on our hands. It's just that
13 there would be some limited amount of classified
14 documents that Your Honor would need to review in
15 camera and see whether they need to know.

16 And so that's not a process that we can --
17 we've expedited many things in this case by doing
18 depositions, by figuring out where the documents
19 are, et cetera. But this is just the one thing we
20 can't expedite.

21 THE COURT: I understand. Thank you.
22 That's very helpful.

23 And just for my own -- and forgive my own
24 ignorance here. How long -- let's say we get to
25 that point -- we get to the point that the

1 plaintiffs are hypothesizing here where you have
2 some documents that are ready to go, except for the
3 security clearance process. And I know there's no
4 way to know this in advance, but roughly how long do
5 you think is a reasonable amount of time to expect
6 that process to take?

7 MS. MARRYSHOW: Your Honor, we asked that
8 question and we have not yet gotten a response, so I
9 apologize for that. But we can write to the Court
10 and let you know, if that would be helpful. I
11 hesitate to make a representation to the Court.

12 THE COURT: I appreciate your caution in
13 that. That's fine. I think I cut you off. So is
14 there anything else you'd like to add?

15 MS. MARRYSHOW: No, Your Honor. Except to
16 say that I think the need to know we -- the
17 Government believes, will probably be pretty
18 difficult for Plaintiff to meet anyway. There is a
19 lot of information in the public sphere about this
20 case and we will produce more documents. And I
21 think, obviously, we don't know because we haven't
22 done the searches and the counsel for the Government
23 here hasn't seen what's behind those classified
24 materials.

25 But given that there is so much information

1 about this case, including the documentary, there
2 are books, the FOIA materials, it's just hard to
3 imagine a factual scenario where they would really
4 need to know what's behind those to prove up their
5 case. But if that is the case, that would be
6 something that would have to happen at the end.

7 THE COURT: Okay. Thank you for that.

8 Let me come back to Ms. Francois for just a
9 moment, and let me ask you about the proposal that
10 you had to the Government about -- based on their
11 view that they really can't engage with a security
12 clearance process until document discovery is --
13 that process is at least underway, if not
14 substantially complete, even.

15 What was your proposal to the Government as
16 far as serving document discovery requests now?

17 MS. FRANCOIS: So our proposal to serve the
18 discovery request was to give the Government some
19 guidance about what types of documents we'd be
20 seeking. During the meet-and-confer process, we did
21 actually email them a list of categories of
22 documents that we thought would be relevant to this
23 case. We make clear that those weren't formal
24 discovery requests, but that we hoped it would be
25 helpful to them and help guide our conversations,

1 because during the initial conference, it had been
2 raised that, you know, it would be more helpful if
3 we gap a little bit more concreteness about the
4 types of documents that we are seeking.

5 So we provided that, and we offered this
6 proposal to send us -- to provide more formal
7 discovery requests if this is what they need to show
8 their FBI counterparts or whoever, that we have
9 demonstrated this foreseeable need. So that was
10 just a proposal, but, again, that was just to start
11 this process of more clearly identifying the
12 documents. But, again, we don't think that's
13 necessary, but we do know that the Vault documents
14 are relevant.

15 THE COURT: Thank you, Ms. Francois. I
16 understand your overall position about -- that the
17 security clearance process should start now. I'm
18 just trying to get some clarity as to sort of what
19 the parties have talked about and what it looks like
20 as a practical matter.

21 What you sent over to the Government, was
22 that essentially all of the document discovery that
23 you anticipate seeking in the case? And, obviously,
24 I know you don't maybe know everything you might
25 seek now, or was it some subset that you thought

1 might trigger this security clearance issue?

2 MS. FRANCOIS: It was a fairly
3 comprehensive list, Your Honor. I don't know if I
4 would say that that's the entirety of it, because we
5 weren't preparing that list with the view that these
6 are formal discovery requests. So we would probably
7 like --

8 THE COURT: I understand.

9 MS. FRANCOIS: -- but it would be a
10 significant overlap.

11 THE COURT: I guess what I'm trying to get
12 at is whether it was sort of a subset of -- you
13 know, like, if you were leaving out certain things
14 that you didn't think implicated the security
15 clearance issue --

16 MS. FRANCOIS: No.

17 THE COURT: -- if you were maybe -- okay.
18 Sorry. Go ahead.

19 MS. FRANCOIS: Yeah, no, Your Honor. We
20 weren't trying to exclude any documents about --
21 that conversation, that list that we provided was to
22 help our meet and confer about the various issues,
23 not just about the security clearance. So we
24 weren't trying to --

25 THE COURT: Okay.

1 MS. FRANCOIS: -- just to -- yeah. Just
2 for certain security clearance.

3 THE COURT: I understand.

4 Let me just come back to Ms. Marryshow with
5 a question.

6 I assume you've reviewed this list that the
7 plaintiffs sent over. How burdensome would it be to
8 the Government to initiate the process of collection
9 and review of those documents? And I know they
10 weren't formal discovery requests -- document
11 requests, but do you have a sense for that?

12 MS. MARRYSHOW: Yeah, we do. We've talked
13 to the FBI. It would be incredibly burdensome
14 because it would mean -- I mean, we wouldn't have an
15 answer on security clearances in -- you know, it's
16 not that we can -- as I was saying earlier, we can't
17 just get to the classification issue. So it would
18 be incredibly burdensome because we would just be
19 starting document discovery because the
20 classification issue has to come at the end because
21 it will be, like, you know, whatever the remainder
22 is. It's not just relevance, as plaintiffs are
23 saying. It's relevance in the context of everything
24 else that you know and whether this particular
25 classified document that says whatever -- I mean, I

1 don't know -- is so important to the case, as
2 decided by Your Honor, such that they would get
3 access to it. That's what would need to happen.

4 So the document requests don't really, A,
5 move the ball towards getting this done in any kind
6 of real timely manner. And, B, there is -- and
7 sorry. My apologies, Your Honor. But it wouldn't
8 expedite the process, and it would be very
9 burdensome because document discovery in this case
10 is thought to be burdensome. The plaintiffs'
11 requests are very broad. So --

12 THE COURT: I'm not sure I understand your
13 first point, Ms. Marryshow, that it wouldn't
14 expedite the process. I mean, you're telling me
15 that -- as I understand it, anyway, that, from --
16 the Government's position is that the security
17 clearance process can't begin until document
18 discovery.

19 So if we're waiting for document discovery
20 until after the motion to dismiss is resolved, then
21 that would seem to push back the issue of security
22 clearances for some time, wouldn't it?

23 MS. MARRYSHOW: I think what I was trying
24 to say, Your Honor, is that it's not as if -- I
25 think Plaintiffs' proposal, at least as I understood

1 it, was that they seem to think that there is some
2 way, other than full-blown document discovery, to
3 get at the classified documents issue. So that is
4 only what we're saying, Your Honor.

5 That, like, because there is no quick
6 responses and objections, and then we'll just deal
7 with only the classified documents issue. All it
8 would mean is that we're just in discovery at that
9 point.

10 THE COURT: Okay. I understand. All
11 right.

12 Well, I think I understand the parties'
13 respective positions here. And let me tell you what
14 I'm thinking.

15 First, I just want to start by saying I
16 very much appreciate how you-all have worked
17 together from the first appearance and since then on
18 trying to resolve as much as possible. And it
19 sounds like, at least from the various status
20 reports, that you've been able to resolve a lot and
21 are working together quite well and have only come
22 because you just have a serious impasse here now.
23 So, first, I just appreciate what everyone has been
24 doing in the spirit of cooperation.

25 The second thing I would say is, that it

1 sounds to me like -- and I accept the Government's
2 representation here -- that the security clearance
3 process can't start until there's full-blown
4 document discovery. But that leads me to the
5 question of why we shouldn't just have full-blown
6 document discovery now. My normal practice is not
7 to stay a case merely because a motion to dismiss is
8 pending.

9 Now, I know that you're trying to limit the
10 burden -- the discovery burden on the parties for
11 now and have been working together on that. And
12 again, I really, really appreciate that. But as a
13 general matter, that hasn't been my normal practice.

14 Now, that being said, I have stayed all
15 discovery in cases from time to time when there's a
16 motion to dismiss that's pending. And so that's
17 obviously not what we're talking about here. You've
18 agreed to conduct some now. The question is, I
19 guess, now whether or not document discovery should
20 begin in earnest.

21 And what I think would make sense, because
22 I don't have, I think, as firm a grasp at this point
23 as to how burdensome it would be. I understand the
24 Government's representation that it would be quite
25 burdensome, but I don't have that all in front of

1 me. What I would ask you to do, I think, is brief
2 the issue as to whether or not document discovery
3 should just begin in earnest now. And because I
4 normally permit discovery, I think the burden would
5 be on the Government to show why a stay of document
6 discovery would be appropriate here.

7 So I guess what I would like to do is ask
8 the Government to do a letter brief on that, and
9 then I'll allow the plaintiffs to oppose it. So
10 that's what I'm going to ask you to do. I'm going
11 to propose a timeline here so that we can move
12 things along expeditiously. But if it's a problem
13 for the parties, I'm willing to hear you on that.

14 What I would say is three business days for
15 each side. So today is Monday, the 24th, and if I
16 could get something from the Government by Thursday
17 the 27th. And then three business days for the
18 opposition from the plaintiffs, that would make it
19 July 2nd. And then I try to get a ruling to you as
20 soon as I could.

21 So that's how I think I want to proceed
22 here. But, again, I'm open to other suggestions.

23 Why don't I hear from Ms. Francois first.

24 MS. FRANCOIS: Your Honor, that proposal
25 sounds great to us. Thank you, Your Honor.

1 THE COURT: Ms. Marryshow?

2 MS. MARRYSHOW: That's fine Your Honor.

3 THE COURT: Okay. So I'll put out a
4 post-conference order just memorializing all that,
5 but I think you understand how I'd like to proceed
6 here.

7 Is there anything else that you-all would
8 like to raise with me?

9 Ms. Francois?

10 MS. FRANCOIS: No, Your Honor. None at
11 this time.

12 THE COURT: Okay. Ms. Marryshow?

13 MS. MARRYSHOW: No, Your Honor.

14 THE COURT: Okay. Thank you very much for
15 your time. I really appreciate it.

16 MS. FRANCOIS: Thank you, Your Honor.

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C E R T I F I C A T E

I, Marissa Lewandowski, certify that the foregoing transcript of proceedings in the case of Greene Johnson, et al. v. United States of America, Docket #1:24-cv-00872, was prepared using digital transcription software and is a true and accurate record of the proceedings.

Signature Marissa Lewandowski

Marissa Lewandowski

Date: June 27, 2024